Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

AMERICAN LIFE & CASUALTY INSURANCE COMPANY,

Petitioner,

v.

ANNE C. TROSTEL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Prior to September 30, 1996, federal law prohibited enforcement of gold clause obligations incurred before October 27, 1977, but permitted enforcement of a gold clause "obligation issued after October 27, 1977." 31 U.S.C. § 5118(d)(2). In this case, the Eighth Circuit held that an assignment in 1990 of a 1917 lease containing a gold clause constituted an "obligaton issued after October 27, 1977" under Section 5118(d)(2), thus "reviving" the previously unenforceable gold clause and effectively increasing the annual rent under the lease by almost 20 times. Shortly thereafter, on September 30, 1996, Congress amended Section 5118(d)(2) to provide that a gold clause obligation is unenforceable "notwithstanding any assignment or novation of such obligation after October 27, 1977, unless all parties to the assignment or novation specifically agree to include a gold clause in the new agreement." Pub. L. No. 104-208, § 2609 ("1996 Amendment"). This Court granted certiorari, vacated the Eighth Circuit's decision, and remanded the case for reconsideration in light of the 1996 Amendment. While the case was pending, on remand, Congress amended Section 5118(d)(2) again, this time repealing the 1996 Amendment. The Eighth Circuit reinstated its decision holding (1) that the 1996 Amendment had no effect on its prior decision and (2) that in any event the 1997 repeal applied retroactively to cover the 1990 assignment. The questions are:

QUESTIONS PRESENTED – Continued

1. Did the Court of Appeals err in reinstating its prior decision despite the 1996 Amendment, which directly overruled that decision?

2. Did the Court of Appeals violate this Court's long-standing presumption against retroactive legislation by applying the 1997 repeal retroactively despite the absence of any evidence that Congress intended such a result?

PARTIES TO THE PROCEEDING

American Life and Casualty Insurance Company is the Petitioner. Anne C. Trostel, Harry A. Holman, Jr., H.L. Van Metre, Charles H. Van Metre, Dorothy Hurley, Terrance M. Hurley, Cmdr., and Carol Sabey are the Respondents.

RULE 29.6 STATEMENT

American Life and Casualty Insurance Company (ALCIC) owns 98% of Vulcan Life Insurance Co. ALCIC's parent is American Life Holdings, Inc., which is wholly owned by CIHC Incorporated. CIHC Incorporated is wholly owned by Conseco, Inc.

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PETITION FOR A WRIT OF CERTIORARI

American Life & Casualty Insurance Company ("American Life") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, dated January 15, 1998, is reported at 133 F.3d 679 (8th Cir. 1998) (hereinafter *"Trostel II"*) and is reprinted in the appendix hereto ("App.") at 1a. The opinion of the United States Court of Appeals for the Eighth Circuit, dated August 14, 1996, is reported at 92 F.3d 736 (8th Cir. 1996) (hereinafter *"Trostel I"*) and is reprinted in the appendix hereto at App. 11a. The opinion and order of the United States District Court for the Southern District of Iowa is unreported and is reprinted at App. 28a.

JURISDICTION

The judgment of the Court of Appeals was entered on January 15, 1998. App. 1a. The jurisdiction of the Court of Appeals was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISIONS

Prior to September 30, 1996, Section 5118(d)(2) of Title 31, United States Code, provided: "An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in

United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977."

On September 30, 1996, Congress amended Section 5118(d)(2) by adding the following provision: "This paragraph shall apply to any obligation issued on or before October 27, 1977, notwithstanding any assignment or novation of such obligation after October 27, 1977, unless all parties to the assignment or novation specifically agree to include a gold clause in the new agreement. Nothing in the preceding sentence shall be construed to affect the enforceability of a Gold Clause contained in any obligation issued after October 27, 1977 if the enforceability of that Gold Clause has been finally adjudicated before the date of enactment of the Economic Growth and Regulatory Paperwork Reduction Act of 1996." Pub. L. No. 104-208, § 2609 (the "1996 Amendment").

On October 10, 1997, Congress again amended Section 5118(d)(2), this time simply by "striking 'This paragraph shall' and all that follows through the end of the paragraph." Pub. L. No. 105-61, § 641 ("1997 Amendment"). The 1997 Amendment thus repealed the 1996 Amendment.

INTRODUCTION

This "gold clause" case was before the Court just last Term, when the Court granted our certiorari petition, vacated the Court of Appeals' decision, and remanded the case "for further consideration in light of the Economic Growth and Regulatory Paperwork Reduction Act of 1996," which had been passed during the interval between the Court of Appeals' decision and the filing of

the certiorari petition. 117 S. Ct. 939 (1997). The decision vacated by this Court had held that a previously invalid and long-forgotten "gold clause" contained in a 99-year ground lease executed in 1917 was "revived" in 1990 when the lessee assigned the lease to its wholly-owned subsidiary, Petitioner American Life & Casualty Insurance Company. The Court of Appeals thus held that in entering a standard assignment agreement, the lessor and its wholly-owned subsidiary intended to revive the gold clause – and thus to raise *their own rent* by a factor of approximately 20 times – despite the court's acknowledgment of the undisputed fact that neither the lessee nor Petitioner (nor the lessor, Respondents here) even considered the ancient and theretofore meaningless gold clause in connection with the 1990 assignment.

Aiming specifically at the "unfair treatment to leaseholders" reflected in decisions such as this, Congress promptly enacted the 1996 statute, which provided simply that an assignment or novation of an obligation containing a gold clause does not revive the clause "unless all parties to the assignment or novation *specifically agree* to include a gold clause in the new agreement." (Emphasis added.) This Court, accordingly, remanded the case for reconsideration in light of this obviously dispositive congressional enactment.

On remand, however, the Court of Appeals effectively nullified the 1996 Act. While acknowledging Congress' "desire to influence [the] outcome" of this very case, the court nonetheless "reinstate[d] its prior decision." App. 8a. Reiterating its earlier opinion that the parties' assignment agreement, which contained a standard provision incorporating by reference the terms of the 1917 lease, "included . . . the gold clause," the court

concluded that the assignment satisfied the 1996 statute's requirement that the parties "specifically agree to include a gold clause in the new agreement." App. 7a. The court, in so holding, plainly frustrated Congress' sole purpose in addressing this issue and rendered the 1996 statute meaningless.

The Court of Appeals, however, made another, perhaps more fundamental error. In October 1997, while the case was pending on remand before the Court of Appeals, Congress repealed the 1996 statute. Neither the language nor the legislative history of the 1997 repeal statute, however, contains any indication whatsoever that Congress intended the repeal to apply retroactively to the parties' 1990 assignment agreement. Nor would prospective-only application of the repeal statute render it ineffective. Accordingly, the 1997 repeal statute falls squarely within this Court's decisions holding that statutory retroactivity cannot be implied, but rather must be grounded upon a "clear expression of congressional intent to reach cases that arose before [the statute's] enactment." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 307 (1994). The 1997 repeal statute, therefore, applies prospectively only and has no effect at all on this case.

Although the Eighth Circuit acknowledged that the 1997 repeal statute "simply states that the prior amendment is stricken" and "does not use the type of language normally associated with retroactive effect," it nonetheless concluded that Congress' "apparent intent" was "to return the law to its former state as it existed in 1990 at the time of the assignment. . . . " App. 5a, 6a. The court stressed that nothing in the language of the 1997 repeal statute "was carefully crafted to prevent its application here." App. 6a. The court thus precisely reversed the

presumption against statutory retroactivity, which can be overcome only by a clearly expressed congressional intent to the contrary. *See, e.g., Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

The rulings below are thus deeply flawed, and the issues presented in this case warrant this Court's plenary review. Indeed, we respectfully submit that the Court of Appeals' errors are so manifest that an order summarily reversing the decision below is justified in this case.

STATEMENT OF THE CASE

1. At the heart of this case is a "gold clause" contained in a 99-year ground lease on a parcel of commercial property located in Des Moines, Iowa. When the lease was entered in 1917, gold clauses were commonly included in leases, government and corporate bonds, and other long-term obligations to protect the parties from fluctuations in the value of the dollar. *See Norman v. Baltimore & O.R. Co.*, 294 U.S. 240 (1935) (railroad bond); *Perry v. United States*, 294 U.S. 330 (1935) (government bond); *Holyoke Water Power Co. v. American Writing Paper Co.*, 300 U.S. 324 (1937) (lease). The gold clause at issue here provides: "[A]t the option of the lessor, all payments under this lease shall be made in gold coin of the United States of America, of or equal to the present standard of weight and fineness." App. 12a.

The original lease called for an annual rent of $12,000. The lease was amended, however, in 1930 to increase the rent to $23,000 per year, and that amount was paid by the lessee and accepted by the lessor until December 1993, when Respondents, the successors in

interest to the original lessor, abruptly demanded that Petitioner pay its rent in United States gold coins of the 1917 standard of weight and fineness, which in current dollars amounted to an annual rent of approximately $460,000 – almost 20 times the face amount.

The lease also contains an assignment clause, which grants to the lessee "the right to transfer or assign [the] lease" and provides that such an assignment, upon recordation and notice to the lessor, releases the assignor-lessee from personal liability under the lease. App. 39a. Thus, the lessor's *contemporaneous* consent to an assignment of the lease is not required. Rather, under the assignment clause of the original lease, the lessor effectively consents to any future assignment of the lessee's interest, and to the release of the assignor-lessee from liability. Petitioner American Life became the lessee in August 1990 through an assignment from its corporate parent, The Statesman Group ("Statesman"). Statesman, in turn, had acquired the lease in December 1985 through an assignment by another entity under its control, State Automobile and Casualty Underwriters ("State Auto"), which had acquired the lease through an assignment from an unrelated entity in 1969. Thus, Statesman has controlled the lease since 1969, and it is undisputed that State Auto's 1985 assignment of the lease to Statesman and Statesman's 1990 assignment of the lease to Petitioner American Life, were effectuated for reasons wholly internal to the organization. Respondents were not signatories to the 1985 and 1990 assignment agreements. The lessor had given its prior consent to the assignment clause of the original 1917 lease.

2. Responding to the widespread economic distress caused by the Great Depression, Congress and President

Franklin Roosevelt undertook in 1933 a series of measures designed to devalue the dollar and thus to inflate domestic prices.[1] Chief among those measures was enactment of a Joint Resolution declaring all gold clauses "against public policy" and providing that

> no such provision shall be contained in or made with respect to any obligation hereafter incurred. . . . Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts . . . .

Joint Resolution of June 5, 1933, ch. 48, 48 Stat. 112, 113.[2] In 1977 Congress amended the 1933 Joint Resolution, permitting the use of gold clauses in contractual obligations incurred after October 27, 1977. Pub. L. No. 95-147, § 4(c), 91 Stat. 1227, 1229 (1977) (codified at 31 U.S.C. § 5118(d)(2)). Congress subsequently recodified the 1933 Joint Resolution, as amended in 1977, to read as follows:

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[1] *See, e.g., Norman v. Baltimore & O.R. Co.*, 294 U.S. at 295-96; *Perry v. United States*, 294 U.S. at 349-54, 368; Kenneth W. Dam, *From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law*, 50 U. Chi. L. Rev. 504, 508-14 (1983).

[2] Not surprisingly, the 1933 Joint Resolution spawned a number of constitutional challenges. This Court upheld the constitutionality of the measure insofar as it invalidated gold clauses in private obligations. *See Norman v. Baltimore & O.R. Co., supra* (railroad bonds); *Holyoke Water Power Co. v. American Writing Paper Co., supra* (private leases). The Court upheld, however, a Fifth Amendment challenge to the 1933 Joint Resolution insofar as it purported to invalidate gold clauses in the government's own bonds. *Perry v. United States, supra.*

> An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977.

31 U.S.C. § 5118(d)(2).[3]

As discussed fully below, following the Court of Appeals' initial decision in this case, Congress twice amended Section 5118(d)(2). The first amendment, enacted in September 1996, had the specific effect of overruling the Eighth Circuit's decision in this case. Pub. L. No. 104-208, § 2609 (Sept. 30, 1996). The second amendment, enacted in October 1997, repealed the 1996 Amendment.

3. By letter dated December 27, 1993, Respondents demanded that Petitioner pay its rent in gold coin pursuant to the gold clause of the 1917 lease.[4] Petitioner rejected Respondents' demand for a twenty-fold increase in its rental payment, and on July 29, 1994, Respondents initiated this action to enforce the gold clause. Respondents based their claim entirely on the 1990 assignment agreement between Petitioner and its corporate parent, Statesman. Respondents argued, first, that the 1990 assignment agreement constituted "an obligation issued after October 27, 1977" under Section 5118(d)(2) and thus

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[3] The legislative history of the recodification makes clear that Congress did not intend to effect any substantive changes to the statute. H.R. Rep. No. 651, 97th Cong., 2d Sess. 1-4 (1982).

[4] The demand in the December 27, 1993, letter was made on behalf of parties holding two-thirds of the lessors' interests. A similar demand was made on March 29, 1994, on behalf of parties holding the remaining one-third of the lessors' interests. App. 17a & n.6.

could lawfully contain an enforceable gold clause. Second, Respondents argued that the 1990 assignment agreement had incorporated by reference the original 1917 lease in its entirety and thus had "revived" the previously unenforceable gold clause. App. 18a. In support of their claim, Respondents relied entirely upon *Wells Fargo Bank, N.A. v. Bank of Am. NT & SA*, 38 Cal. Rptr. 2d 521 (Cal. App. 1995) and *Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946 (W.D. Wash. 1986), *aff'd sub nom. Fay Corp. v. Frederick Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990), both of which held that a post-1977 assignment of a pre-1933 lease containing a gold clause constituted a "novation" of the lease, thus rendering the gold clause binding and enforceable against the new lessee. Respondents moved the district court for partial summary judgment declaring Petitioner in default under the lease for failing to make its rental payments in gold coin.

The district court rejected Respondents' arguments and entered summary judgment in favor of Petitioner. The court, "respectfully disagreeing with the basic premise" of the *Wells Fargo Bank* and the *Fay Corp.* cases, held that the 1933 Joint Resolution had voided all existing gold clauses and that the gold clause at issue here had thus been, "in effect, erased from the 1917 Lease." App. 37a. Incorporating the 1917 lease by reference into the 1990 assignment agreement therefore could not and did not revive the gold clause. Rather, "[r]eactivation of the gold clause in a post-1977 Lease would require an overt agreement between the lessor and lessee to do so." App. 38a. And here there was no such agreement; indeed, the 1990 assignment was "not undertaken with an intent to change the terms of the lease, but rather for reasons internal to the organization of Statesman." App. 34a n.1.

4. The Eighth Circuit reversed. App. 11a-27a (*"Trostel I"*). The court held that the 1990 assignment agreement satisfied all the requirements of a valid novation of the lease, which under Iowa law is " 'a substituted contract that includes as a party one who was neither the obligor nor the obligee of the original duty.' " App. 19a, quoting *Klipp v. Iowa Grain Indem. Fund Bd.*, 502 N.W.2d 9, 11 (Iowa 1993). Under Section 5118(d)(2), therefore, the parties to the 1990 assignment agreement "were legally free to incorporate a gold clause into the lease agreement at that time." App. 21a. The Court's inquiry did not end there, however, because the gold clause in the 1917 Lease "was not specifically mentioned in 1990 as being relevant or not." App. 19a. Thus the question, according to the Court of Appeals, was whether Statesman and Petitioner could and did incorporate by reference the gold clause, along with the rest of the 1917 lease provisions, into their 1990 assignment agreement. Relying on *Fay Corp.* and *Wells Fargo Bank*, the Court of Appeals rejected the notion that the 1933 Joint Resolution had "magically erase[d] the gold clause from the 1917 lease" and concluded that "there is no reason that it could not be incorporated by reference in a new lease obligation entered into in 1990." App. 23a.

The Court of Appeals also rejected Petitioner's argument that neither of the parties to the 1990 assignment agreement, nor even the lessors, had intended to change the rent term of the lease. In support of this argument, Petitioner pointed to undisputed evidence in the record that the parties to the 1990 assignment agreement – Statesman and Petitioner – had no intention of obliging Petitioner to pay rent in gold, and that Respondents themselves were not even aware until 1991 that Congress

had amended the 1933 Joint Resolution to permit use of gold clauses in post-1977 obligations. App. 25a. Acknowledging that "the intent of the parties controls" the interpretation of a written contract under Iowa law, the Court of Appeals concluded that, absent ambiguity in the contract's language, "intent is determined by what the contract itself says." App. 25a. The court concluded that Petitioner had unambiguously agreed in the 1990 assignment agreement "to be bound by the terms of the 1917 lease . . . , which included an explicit gold clause," and that "the contract thus should be enforced as written." App. 25a.[5]

Both Petitioner and Respondents filed timely petitions for rehearing. Petitioner reiterated its argument that the circumstances surrounding the 1990 assignment agreement, not to mention the undisputed evidence, left no doubt whatsoever that Petitioner and its parent, Statesman, did not genuinely intend to saddle Petitioner with a twenty-fold increase in its rent under the lease. Petitioner also emphasized that even if Statesman and Petitioner had intended to increase their own rental payments, they could not, as a matter of law, have done so without Respondents' specific contemporaneous agreement. Both parties to a lease must agree to any novation of the lease and the assignment clause of the 1917 lease expresses the prior consent of the lessor (Respondents) to a transfer or assignment only of the lessee's (Statesman)

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[5] Finally, the Eighth Circuit held that the phrase "of present weight and fineness" in the gold clause was ambiguous on whether it referred to the statutory standards applicable to gold coins in 1990 or in 1917. Because resolution of the ambiguity would require a factual inquiry, the Court of Appeals remanded the issue for resolution by the district court. App. 27a.

existing lease obligations. The assignment clause clearly did not express the lessors' prior consent to be bound by *new or different* lease terms contained in an assignment agreement, even new terms favorable to the lessors. The Eighth Circuit denied Petitioner's petition on September 24, 1996.

5. On September 30, 1996, less than two months after the Eighth Circuit rendered its initial decision in this case, Congress enacted an amendment to Section 5118(d)(2) designed "to terminate unintended consequence of the 1977 law, including unfair treatment to leaseholders." 142 Cong. Rec. H4755. The amendment ensures that the old gold clauses apply only when such a clause is the explicit intention of both parties to the contract. The 1996 Amendment reads as follows:

> This paragraph shall apply to any obligation issued on or before October 27, 1977, notwithstanding any assignment or novation of such obligation after October 27, 1977, unless all parties to the assignment or novation specifically agree to include a gold clause in the new agreement. Nothing in the preceding sentence shall be construed to affect the enforceability of a Gold Clause contained in any obligation issued after October 27, 1977 if the enforceability of that Gold Clause has been finally adjudicated before the date of enactment of the Economic Growth and Regulatory Paperwork Reduction Act of 1996.

Pub. L. No. 104-208, § 2609.

In light of this amendment to Section 5118(d)(2), on October 3, 1996, Petitioner filed in the Eighth Circuit a motion to stay the issuance of the Court's mandate, a motion for leave to file a petition for rehearing out of time, and a petition for rehearing. Petitioner argued that

the new legislation directly and specifically governs this case, and neither of its requirements for finding an enforceable gold clause were satisfied. The parties to the 1990 assignment agreement did not specifically agree to include the gold clause in the agreement, nor had the enforceability of the gold clause been "finally adjudicated" prior to the enactment of the provisions. The Court of Appeals denied Petitioner's motions on October 9, 1996.

6. Petitioner filed a timely petition for certiorari on December 13, 1996, arguing (1) that the Eighth Circuit had plainly erred in concluding that Petitioner and its parent corporation had intended in the 1990 assignment to raise Petitioner's own rent by 20 times and (2) that, in any event, Congress had itself specifically addressed the issue in the 1996 Amendment and had directly overruled the Eighth Circuit's decision. In light of the clear and dispositive applicability to this case of Congress' amendment to Section 5118(d)(2), this Court granted the petition, vacated the decision of the Court of Appeals, and remanded the case for reconsideration in light of the 1996 Amendment. *American Life & Cas. Ins. Co. v. Trostel*, 117 S. Ct. 939 (1997). App. 10a.

7. On October 10, 1997, while the case was pending before the Eighth Circuit on remand from this Court, Congress again amended Section 5118(d)(2), this time by simply "striking 'This paragraph shall' and all that follows through the end of the paragraph." Pub. L. No. 105-61, § 641. Thus, the 1997 Amendment effectively repealed the 1996 Amendment.

8. On remand, the Court of Appeals "reinstate[d] [its] prior decision, " ruling (1) that the 1996 Amendment did not affect its decision in *Trostel I* that the 1990 assignment agreement had revived the 1917 gold clause

and (2) that, in any event, the 1997 Amendment should be applied retroactively to cover the 1990 assignment. App. 8a. With respect to the effect of the 1996 Amendment, the court acknowledged that "[t]he 1996 amendment required that a gold clause be specifically agreed to in order to be effective" and that "the substituted contract must therefore demonstrate explicit intent to include a gold clause in the new obligation." App. 6a, 7a. Although the court well understood that the 1996 "amendment reflected a [congressional] desire to influence [the] outcome" of this very case, and despite the uncontested fact that none of the parties even contemplated, let alone specifically agreed, that the assignment would revive the gold clause, the Court of Appeals again concluded that the gold clause was revived solely by virtue of the 1990 assignment. App. 6a. The court reasoned that the assignment, by reference, "specifically included each clause of the original contract" and that this fact alone demonstrated "the parties intent to agree to include . . . the gold clause in the new agreement created in 1990. . . . " App. 7a, 8a. Because Petitioner and its corporate parent "specifically agreed" to revive the gold clause, the 1996 Amendment was satisfied.[6]

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[6] The Eighth Circuit also rejected Petitioner's argument that the lessors could not possibly have "specifically agreed" to the inclusion of the gold clause in the 1990 assignment, given the uncontested fact that "the lessors did not even realize that they could demand payment under the gold clause until 1991." App. 8a. According to the Court of Appeals: "The original lessor agreed in 1917 to all future assignments of the lease, . . . and thus there was no need for them to agree to the gold clause contemporaneously with the 1990 novation." App. 8a.

In reinstating its prior decision, the Court of Appeals also relied upon the 1997 Amendment to Section 5118(d)(2). Petitioner, noting that the language and legislative history of the 1997 Amendment was silent as to its temporal effect, argued that under this Court's decision in *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), the statute could not be given retroactive effect. The Court of Appeals acknowledged that the 1997 Amendment "does not use the type of language normally associated with retroactive effect," App. 5a, but concluded nonetheless that Congress' "apparent intent" was to give the amendment retroactive effect. App. 5a. The Court of Appeals effectively reversed the traditional presumption against retroactive legislation, reasoning that because "there is nothing to suggest that the language [of the amendment] was carefully crafted to prevent" retroactive application, such effect must be inferred. App. 6a. This result was justified, according to the Eighth Circuit, because applying the 1997 Amendment retroactively in this case "would not implicate the policy interests underlying the presumption against retroactivity." App. 5a.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Disregarded the Clear Congressional Directive Overruling Its Prior Decision

In enacting the 1996 Amendment, Congress took the issue presented by this case into its own hands and resolved it in favor of Petitioner. Responding specifically to the "unfair treatment to leaseholders" reflected in the *Wells Fargo Bank* case, the *Fay Corp.* case, and now this case, Congress amended Section 5118(d)(2) on September 30, 1996, "to terminate unintended consequences of the 1977 law" by "ensur[ing] that the old gold clauses apply

only when such a clause is *the explicit intention* of both parties to the contract." 142 Cong. Rec. H4754-01, H4755 (emphasis added).[7] Just two sentences long, the amendment makes clear that pre-1977 gold clause obligations are unenforceable "notwithstanding any assignment or novation of such obligation after October 27, 1977, unless

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[7] This amendment was previously introduced as part of the United States Housing Act of 1996 (H.R. 2406). In its original form, the amendment stated, "This paragraph shall continue to apply to any obligations issued on or before October 27, 1977, notwithstanding any assignment and/or novation of such obligations after such date, unless all parties to the assignment and/or novation specifically agree to include a gold clause in the new agreement." 142 Cong. Rec. H4868. The floor manager's summary to H.R. 2406 makes it clear that the amendment was aimed at completely foreclosing the inequities visited upon leaseholders under the reasoning adopted by the Eighth Circuit: The amendment clearly was intended "to terminate unintended consequences of 1977 law, including unfair treatment to leaseholders." 142 Cong. Rec. H4755. The amendment ensures that the old gold clauses apply only when it is the explicit intention of both parties to the contract to revive such clauses. In the Senate, this amendment was introduced as part of the Economic Growth and Regulatory Paperwork Reduction Act of 1995. The accompanying Senate Report read as follows:

> [The amendment] concerns gold clauses in real estate contracts. Gold clauses are sometimes used in real estate contracts to specify that payment is to be tendered in gold or in a dollar amount equivalent to gold. In 1933, gold clauses were made unenforceable. In 1977, the Congress permitted gold clauses to be used again in real estate contracts. This provision would clarify that the ban on gold clauses continues for those contracts prior to 1977 and *cannot be revived*, through assignments or novations, unless the parties specifically agree to it.

S. Rep. No. 185, 104th Cong. 1st Sess. (1995) (emphasis added).

all parties to the assignment or novation specifically agree to include a gold clause in the new agreement." Pub. L. No. 104-208, § 2609 (emphasis added).[8] This case falls precisely within the language and purpose of the 1996 Amendment to Section 5118(d)(2), as the Court presumably recognized in vacating the Eighth Circuit's decision in *Trostel I*.

Indeed, the Eighth Circuit's holding in this case vividly illustrates the "unfair treatment to leaseholders" that motivated Congress to enact the 1996 Amendment. It is common ground between the parties – and the panel below – that the 1977 Amendment to Section 5118(d)(2) did not *automatically* revive the gold clause in the 1917 lease. Respondents clearly could not have demanded

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[8] To ensure that the amendment conformed to the separation of powers principles announced by this Court in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), Congress added the following sentence: "Nothing in the preceding sentence shall be construed to affect the enforceability of a Gold Clause contained in any obligation issued after October 27, 1977 if the enforceability of that Gold Clause has been finally adjudicated before the date of enactment of the Economic Growth and Regulatory Paperwork Reduction Act of 1996." Pub. L. No. 104-208, § 2609. Respondents have not suggested, and the Eighth Circuit did not find, that this provision rendered the 1996 Amendment inapplicable to this case. Indeed, given that the time for filing a petition for certiorari had not elapsed nor even begun to run, when the 1996 Amendment was enacted, it is clear that this case was not "finally adjudicated" at that time. *See, e.g., Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987) ("[b]y 'final,' we mean a case in which a judgment . . . has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied") (citing *United States v. Johnson*, 457 U.S. 537, 542 n.8 (1982)); *Linkletter v. Walker*, 381 U.S. 618, 622 n.5 (1965).

payment in gold from the lessee at that time. Respondents and the panel agree, then, that a post-1977 new agreement or novation of the lease agreement was necessary to "revive" the 1917 obligation to pay rent in gold coin or to establish a new obligation to that effect.

According to the panel, the post-1977 agreement creating Petitioner's "new obligation" to pay the Respondents in gold coin was not an agreement between Petitioner and Respondents, but rather was the 1990 assignment agreement between Petitioner and its parent, Statesman. As the panel acknowledged, "[Petitioner] American Life's obligations under the lease were created by the 1990 [assignment] agreement between it and Statesman." App. 19a. The 1990 assignment agreement, according to the panel, "did not purport to transfer [Statesman's] *own* obligations" under the lease, but instead transferred to Petitioner "the terms and conditions of the 1917 lease." App. 24a (emphasis added). Similarly, "[n]othing in the 1990 [assignment] agreement indicated that [Petitioner] American Life accepted only those obligations that had been legally enforceable against all previous lessees. Instead, it specifically agreed to be bound by the obligations described in the 1917 lease," which "contained an explicit gold clause." App. 24a. According to the panel, then, Statesman transferred to its wholly owned subsidiary an obligation to pay Respondents in gold coin – an obligation that Statesman itself did not have and that resulted in a nearly twenty-fold increase in the rent to be paid by Petitioner to Respondents.

While the Court of Appeals acknowledged that "the intent of the parties controls" the interpretation of a written contract under Iowa law, App. 25a, the court

simply did not come to grips with undisputed facts demonstrating, with certainty, that neither of the parties to the 1990 assignment agreement, nor even Respondents, genuinely intended the 1990 assignment agreement to require that rental payments be made in gold coin. First, as we have previously noted, the notion that Statesman and Petitioner, gratuitously and for no apparent reason, intended the 1990 assignment to obligate Petitioner to a new rental term amounting to an almost twenty-fold increase in rental payments is, on its face, so implausible as to preclude its acceptance absent unmistakable contract language compelling such a result. The Eighth Circuit did not attempt to explain why Statesman, in effect, raised its own annual rent obligation from $23,000 to $460,000. Second, it is undisputed that for over three years after the Respondents allegedly became entitled under the 1990 assignment agreement to receive an annual rent of approximately $460,000, Petitioner tendered, and Respondents accepted, monthly rental payments totaling $23,000 per year. The panel below did not attempt to explain why Respondents effectively made a donation to Petitioner of approximately $437,000 per year for over three years.[9]

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[9] This point is made even more telling by the undisputed fact that in 1985 Statesman acquired its leasehold interest from another wholly owned subsidiary, State Auto, in an assignment agreement that is identical in all material respects to the 1990 assignment agreement with Petitioner. Thus, if Respondents were entitled to insist on gold coin payments from Petitioner as a result of the 1990 assignment agreement, they were equally entitled to insist on gold coin payments from Statesman as a result of the 1985 assignment agreement. Yet, Respondents refrained, gratuitously and for no apparent reason, from requiring its lessees to make such payments for a total of over

Finally, and most importantly, Respondents themselves do not resist the force of these undisputed facts. They *conceded* in their briefing to the Court of Appeals in *Trostel I* that when the 1990 assignment agreement was entered, neither Statesman nor Petitioner "even thought about whether the 1990 Warranty Assignment contained a gold clause."[10] And Respondents admitted that they were not even aware that Congress had legalized post-1977 gold clauses until 1991. *Id.* Indeed, as we have noted, Respondents did not even assert their alleged right to insist on payment in gold coin until December 1993. In *Trostel I*, the Court of Appeals confirmed these facts, twice acknowledging that the gold clause was not even mentioned, let alone specifically agreed to, by the parties to the 1990 assignment agreement. *See* App. 19a ("American Life's obligations under the lease were created by the 1990 warranty agreement between it and Statesman. . . . [T]he gold clause, of course . . . was not specifically mentioned in 1990 as being relevant or not."); App. 21a. ("the parties did not explicitly mention gold"). Yet the Eighth Circuit nonetheless construed the 1990 assignment

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eight years thus effectively making multi-million dollar gifts to Statesman and Petitioner.

[10] In their briefing to the Eighth Circuit in *Trostel I*, Respondents' admitted that "neither Mr. Matovina nor David J. Noble even thought about whether the 1990 Warranty Assignment contained a gold clause." Reply Brief of Appellants Trostel, et al., at 17-18. At the time of the 1990 assignment agreement, Mr. Noble was the President of both Statesman and Petitioner American Life, and Mr. Matovina was Vice President of both Statesman and Petitioner American Life. *Id.* at 10 n 7, 17 n.9. Respondents also "admit[ted] that they did not realize until 1991 their ability to demand payment in gold following the 1977 Congressional amendment." *Id.* at 16 n.8.

agreement to require Petitioner to make its rental payments in gold coin. If the "intent of the parties controls" the interpretation of a written contract, then the 1990 assignment agreement did not contain an enforceable gold clause, and the Eighth Circuit plainly erred in concluding otherwise in *Trostel I*.

But even assuming *arguendo* that the Eighth Circuit's decision in *Trostel I* was correct, it is clear under the 1996 Amendment that the parties to the 1990 assignment did not "specifically agree" to include the gold clause and that Petitioner cannot be required to pay its rent in gold coins. Despite the plain language of the 1996 Amendment and Congress' acknowledged "desire to influence [the] outcome" of this very case, App. 6a, the Eighth Circuit reinstated its prior decision, interpreting the amendment in such a way as to render it entirely meaningless. The Court of Appeals held that the mere fact of a standard assignment of a contract containing an otherwise moribund gold clause was itself, without any other evidence of the parties' intent, sufficient to revive the gold clause under the 1996 Amendment. In enacting the 1996 Amendment, however, the *unintentional* revival of a gold clause through the mere assignment or novation of a pre-1977 obligation is precisely – *precisely* – what Congress sought to prevent in enacting the 1996 Amendment to Section 5118(d)(2). Indeed, it is hard to imagine how Congress could have made its intent more explicit in this regard.

The Eighth Circuit's decision thus violated the "cardinal principle of statutory construction . . . that it is [the courts'] duty to give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section." *Bennett v. Spear*, 117 S. Ct. 1154, 1166

(1997) (internal citations omitted). This Court has consistently rejected interpretations of a statute which would "render altogether meaningless a congressional enactment." *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 560 (1963); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992) (rejecting statutory interpretation that "violates the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect"). The Eighth Circuit's holding in this case, however, renders the 1996 Amendment entirely nugatory, for under its interpretation of this enactment a standard assignment of a contract containing a gold clause, without more, is deemed sufficient to revive the previously unenforceable gold clause. Under this view, the requirement that parties to an assignment or novation "specifically agree to include a gold clause in the new amendment" is meaningless because an assignment alone is deemed to be conclusive evidence of the parties' "specific agreement to revive the gold clause."

As demonstrated above, the Eighth Circuit's decision is irreconcilable with the plain language of the statute and violates fundamental principles of statutory construction. Accordingly, plenary review and correction of the decision is necessary. Indeed, the error below is so manifest and palpable that a summary reversal on the merits is warranted in this case.

II. The 1997 Amendment Has No Relevance To This Case Because It Is Not Retroactive.

The Eighth Circuit compounded its error by holding that the 1997 Amendment should be applied retroactively, thus rendering the 1996 Amendment inapplicable to the 1990 assignment. In contrast to the 1996 Amendment,

which expressly specified that it applied retroactively to "any assignment or novation of [an] obligation after October 27, 1977," the 1997 Amendment is silent as to its temporal application. The Court of Appeals' decision is thus flatly contrary to this Court's decisions establishing the presumption against retroactive legislation. *See, e.g., Landgraf*, 511 U.S. 244.[11]

The presumption against statutory retroactivity, can be overcome only when the legislation itself, as the *Plaut* Court put it, "makes clear that it is retroactive." *Plaut v. Spendthrift Farm*, 514 U.S. at 226. Indeed, in *Landgraf*, 511 U.S. at 284, this Court surveyed at length its decisions on statutory retroactivity, noting that it had never, "in any case . . . *in which Congress had not clearly spoken*, . . . read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment." (emphasis added). And the level of clarity required to establish statutory retroactivity is very high. While expressed in a variety of formulations, this Court's teaching on this point is perhaps best captured by its unanimous observation that "congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this

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[11] In *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), this Court defined "retroactive legislation" as "legislation that prescribes what the law *was* at an earlier time, when the act whose effect is controlled by the legislation occurred. . . . " *Id.* at 225 (emphasis in original). It follows that "[w]hen a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." *Id.* at 226.

result." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).[12] It is clear that these principles of statutory retroactivity apply no less to the repeal of a statute than to the enactment of a statute. *See United States v. Magnolia Petroleum Co.*, 276 U.S. 160, 162-63 (1928); *Amoco Production Co. v. Fry*, 118 F.3d 812, 816 (D.C. Cir. 1997); *Salute v. Stratford Greens Garden Apartments*, 136 F.3d 293, 306 (2d Cir. 1998) (Calabresi, J., dissenting).[13]

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[12] *See also, e.g., United States v. Heth*, 7 U.S. (3 Cranch) 399, 413 (1806) (holding statute to be prospective only because it lacked "clear, strong, and imperative" language requiring retroactive application); *Chew Heong v. United States*, 112 U.S. 536, 559 (1884) (applying the "uniformly" accepted rule against "giv[ing] to statutes a retrospective operation, whereby rights previously vested are injuriously affected, unless compelled to do so by language so clear and positive as to leave no room to doubt that such was the intention of the legislature"); *White v. United States*, 191 U.S. 545, 552 (1903) ("Where it is claimed that a law is to have a retrospective operation, such must be clearly the intention. . . . "); *United States Fidelity & Guar. Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908) ("The presumption is very strong that a statute was not meant to act retrospectively. . . . It ought not to receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them. . . . "); *Miller v. United States*, 294 U.S. 435, 439 (1935) ("[A] statute cannot be construed to operate retrospectively unless the legislative intention to that effect unequivocally appears.").

[13] As for those cases retroactively applying repeals of *jurisdictional* statutes, the Court in *Landgraf* explicitly stated that these cases represent a narrow exception to the general presumption against retroactive application of new statutes. *Landgraf*, 511 U.S. at 274 ("We have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed."); *id.* at 292-93 (Scalia, J., concurring). *See also Bruner v. United States*, 343 U.S. 112, 117 n.8 (1952) ("This

Applying these principles to this case, the express language of the 1996 Amendment to Section 5118(d)(2) makes clear that Congress intended it to "prescribe[ ] what the law *was* at an earlier time." *Plaut*, 514 U.S. at 225 (emphasis in original). By its terms, the 1996 Amendment applies to "any assignment or novation of such obligation after October 27, 1977," providing that a pre-1977 gold clause can be revived only if "all parties to the assignment or novation specifically agree to include a gold clause in the new agreement." Pub. L. No. 104-208, § 2609. Moreover, the 1996 Amendment also expressly provided that it did not apply to any gold clause case that had been "finally adjudicated" before its enactment, thus making clear that it *did* apply retroactively to any gold clause case, such as the instant case, that had not been

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jurisdictional rule does not affect the general principle that a statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication.") Likewise, as for those cases in which the repeal of a *criminal* or *punitive statute* has been applied retroactively, the Court in *Landgraf* again explained that "at common law" a rule of retroactive application "applied to statutes that merely *removed* a burden on private rights by repealing a penal provision (whether criminal or civil); such repeals were understood to preclude punishment for acts antedating the repeal." *Landgraf*, 511 U.S. at 270-71. *See also Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 841 (1990) (Scalia, J., concurring) ("[S]ince the beginning of the Republic and indeed since the early days of the common law: absent specific indication to the contrary, the operation of *non-penal* legislation is prospective only.") (emphasis added). In the instant case, the 1997 Amendment neither relates to jurisdiction nor imposes a penalty upon Respondents. Consequently, it is clear that the presumption against retroactive application of statutes applies in this case.

"finally adjudicated" before enactment of the 1996 Amendment.

In contrast, the 1997 Amendment repealing the 1996 Amendment to Section 5118(d)(2) contains no language, let alone clear and unambiguous language, reflecting a congressional intent to repeal the 1996 Amendment *retroactively*. As noted previously, the 1997 Amendment simply strikes the language added to Section 5118(d)(2) by the 1996 Amendment. Accordingly, the repeal has prospective effect only; it applies only to events (i.e., assignments and novations of pre-1977 obligations) that occur after the date on which it was enacted – October 10, 1997. *See, e.g., Landgraf*, 511 U.S. 244. Assignments and novations that occurred before that date (such as the assignment at issue in this case) continue to be governed by the 1996 Amendment to Section 5118(d)(2).

The Eighth Circuit acknowledged that the 1997 Amendment "does not use the type of language normally associated with retroactive effect." App. 5a. Despite the absence of any such language in the statute itself, the court nonetheless held that Congress' "apparent intent" was to give the amendment retroactive effect. App. 5a. This conclusion is wholly untenable in light of the fact that there is no evidence, apparent or otherwise, of such intent. Indeed, the Eighth Circuit conceded as much by ultimately holding that retroactivity was justified here because "there is nothing to suggest that the language [of the Amendment] was carefully crafted to prevent [retroactivity]." App. 6a. This extraordinary conclusion turns the presumption against retroactive application of statutes on its head. Under the Eighth Circuit's reasoning, if a statute contains no language "crafted *to prevent* retroactivity," then retroactive effect should be inferred.

According to the Court of Appeals, its departure from the presumption against retroactivity announced in *Landgraf* was justified because applying the 1997 Amendment retroactively here "would not implicate the policy interests underlying the presumption against retroactivity." App. 5a. Presumably, referring to the fact that at the time of the 1990 assignment, Petitioner and its corporate parent were not relying upon the 1996 Amendment to Section 5118(d)(2), the Eighth Circuit observed that, "the interests of 'fair notice, reasonable reliance and settled expectations,' . . . weigh in favor of interpreting the 1997 amendment to return the law to its former state as it existed in 1990 at the time of the assignment to American Life." App. 6a, quoting *Landgraf*, 511 U.S. at 270.[14]

Although considerations of fairness led to the adoption of the presumption against statutory retroactivity, *see Landgraf, supra*, this Court has never predicated this rule of statutory construction on the existence of reliance interests and similar considerations. To the contrary, this Court expressly rejected this notion in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994), a case which the Eighth Circuit simply ignored. Indeed, any other conclusion would lead to untenable results.

In *Rivers*, for example, the Court squarely held that the presumption against statutory retroactivity does not depend on the actual reliance of the parties on the prior state of the law. The plaintiffs in that case alleged that

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[14] As a factual matter, we note that the Court of Appeals was in error as Petitioner had in fact relied upon the 1996 Amendment when it assigned the lease to another subsidiary in March 1997.

they had been unlawfully terminated from their employment in 1986 in contravention of 42 U.S.C. § 1981 ("Section 1981"). At the time of the alleged termination, the lower courts had consistently interpreted Section 1981 to reach such conduct. In 1989, however, this Court overruled this substantial body of authority and held that Section 1981 did not cover terminations of contracts. *See Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Subsequently, Congress enacted the Civil Rights Act of 1991, which restored the pre-*Patterson* understanding of Section 1981.

In considering the temporal application of this amendment to Section 1981, the Court rejected plaintiffs' contention that "restorative statutes do not implicate fairness concerns relating to retroactivity at least when, as is the case in this litigation, the new statute simply enacts a rule that the parties believed to be the law when they acted." *Rivers*, 511 U.S. at 309. Although the Court acknowledged "the equitable appeal" of this argument, it concluded that its "decisions simply do not support the proposition that we have espoused a 'presumption' in favor of retroactive application of restorative statutes." *Id.* at 310. Thus, the Court held that even where there is no reliance of the parties on the prior state of the law, "[w]e still require clear evidence of intent to impose the restorative statute 'retroactively.' " *Id.* at 311. The Court elaborated:

> Congress, of course, has the power to amend a statute that it believes we have misconstrued. It may even, within broad constitutional bounds, make such a change retroactive and thereby undo what it perceives to be the undesirable past consequences of a misinterpretation of its work product. No such change, however, has the force of law unless it is implemented

> through legislation. Even when Congress intends to supersede a rule of law embodied in one of our decisions with what it views as a better rule established in earlier decisions, its intent to reach conduct preceding the "corrective" amendment must clearly appear.

Id. at 313.

A contrary conclusion would yield untenable results. If reliance of specific parties were the touchstone determining the retroactivity of federal statutes, then the same statute would apply prospectively as to some parties and retroactively as to other parties. In the instant case, such a rule would result in the 1997 Amendment to Section 5118(d)(2) applying retroactively to assignments made prior to the 1996 Amendment (by parties who therefore could not have relied on the 1996 Amendment) but not applying to assignments made after the 1996 Amendment (by parties who presumably did rely on the 1996 Amendment) until enactment of the 1997 Amendment. Such a distinction has no foundation in the plain language of the 1997 Amendment. Indeed, there is no indication, let alone "clear evidence," that Congress intended to impose such a contradictory rule of statutory construction.

Moreover, Congress' prospective repeal of the 1996 Amendment is fair and sensible. The protection of the 1996 Amendment should not be needed by parties to *future* assignments and novations of pre-1977 gold clause obligations. Parties to such future agreements will presumably be on notice of judicial decisions such as the *Wells Fargo Bank* case and the Eighth Circuit's decision in this case, and thus will be alert (unlike Petitioner here) to the fact that the simple assignment of a pre-1977 obligation containing an ancient and forgotten gold clause could bring about an *unintended* twenty-fold increase in

the cost of the obligation. Parties to such future agreements will thus presumably take care to expressly avoid such unintended results.

In short, although Congress plainly had the power to give retroactive force to the 1997 Amendment, Congress gave no indication whatsoever, let alone "a clear expression," *Rivers*, 511 U.S. at 307, of an intent to do so. Because the Eighth Circuit's decision plainly conflicts with this Court's decisions in *Landgraf* and *Rivers*, plenary review by this Court is warranted.

Finally, we respectfully suggest that the Court of Appeals' interpretation of the 1996 Amendment and its retroactive application of the 1997 Amendment to this case are so manifestly erroneous that an order summarily reversing the decision below is amply justified. *See, e.g., Purkett v. Elem*, 514 U.S. 765 (1995); *Hunter v. Bryant*, 502 U.S. 224, 228 (1991); *Cage v. Louisiana*, 498 U.S. 39, 41 (1990).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, and the judgment of the Court of Appeals summarily reversed. Alternatively, the petition should be granted and the case set for plenary review.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 95-3666

Anne C. Trostel; Harry A. Holman, Jr.; H. L. Van Metre; Charles H. Van Metre; Dorothy Hurley; Terrance M. Hurley, Cmdr.; Carol Sabey, Mrs.;	*	
Plaintiffs-Appellants	*	Appeal from the United States District Court for the Southern District of Iowa.
Norwest Bank Fort Collins, N.A.	*	
Trustee-Appellant	*	
v.	*	
American Life & Casualty Insurance Company;	*	
Defendant-Appellee	*	
Hawkeye Bank of Des Moines	*	
Movant	*	

Submitted: November 18, 1997
Filed: January 15, 1998

Before BOWMAN, BEAM, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

This case involving a gold clause in a real estate lease comes before us on remand from the Supreme Court for

further consideration in light of Congressional action subsequent to our decision of August 14, 1996. *Trostel v. American Life & Cas. Ins. Co.*, 92 F.3d 736 (8th Cir. 1996), *vacated*, 117 S. Ct. 939 (1997). We were asked to consider the impact of a statutory amendment which went into effect on September 30, 1996, but before oral argument Congress acted again to eliminate the language added in 1996. The parties have now briefed and argued their conflicting views about the possible impact of these legislative changes on this litigation.

The real estate lease covers a commercial building in downtown Des Moines, Iowa. It was originally entered into in 1917 to run for ninety nine years. The annual rent for the final forty five years was set at $18,000, and the lessor was given the option to demand payment in gold coin as a protection against future inflation. *See Trostel*, 92 F.3d at 738. During the lease period public policy changed in regard to gold. Congress declared in 1933 that gold clauses were against public policy and were therefore dischargeable dollar for dollar in United States currency. Joint Resolution of June 5, 1933, 48 Stat. 112, 113 (1933) (formerly codified at 31 U.S.C. § 463) (codified as amended at 31 U.S.C. § 5118(d)(2)). More than forty years later the policy changed once more. On October 28, 1977, Congress amended the underlying statute to make gold clauses enforceable again if they were part of an obligation issued after October 27, 1977. Act of October 28, 1977, Pub. L. No. 95-147, § 4(c), 91 Stat. 1227, 1229 (codified as amended at 31 U.S.C. § 5118(d)(2)).

The lease was ultimately assigned in 1990 to American Life and Casualty Insurance Company (American Life), and in 1993 the lessors demanded payment of the

rental obligation in gold coin. American Life refused, and the lessors sought a declaratory judgment to enforce their demand. The district court granted summary judgment to American Life. We reversed after determining that the gold clause was enforceable under the 1977 statutory amendment because in the 1990 assignment American Life had assumed all obligations of the original lease. *Trostel*, 92 F.3d at 740-41.

Shortly thereafter Congress amended the underlying statute by adding a provision to the otherwise unrelated Economic Growth and Regulatory Paperwork Reduction Act of 1996. With the new amendment the statute read in pertinent part:

> An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977. **This paragraph shall apply to any obligation issued on or before October 27, 1977, notwithstanding any assignment or novation of such obligation after October 27, 1977, unless all parties to the assignment or novation specifically agree to include a gold clause in the new agreement.**

31 U.S.C. § 5118(d)(2) (1996 amendment highlighted).[1]

The Supreme Court then granted certiorari and remanded the case to this court "for further consideration

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[1] The amendment also provided that it would not apply to gold clause obligations finally adjudicated before its passage.

in light of the Economic Growth and Regulatory Paperwork Reduction Act of 1996, P.L. No. 104-208, Sec. 2609." 117 S. Ct. 939 (1997). A briefing schedule was established, stayed at request of both sides to permit discussions of possible settlement, and then reinstated with modified dates. Before oral argument could be heard, Congress acted again. This time it eliminated the provision it had added to the gold clause statute in 1996. Public Law 105-61, § 641. The legislation, signed into law on October 10, 1997, stated that:

> [s]ection 5118(d)(2) of title 31 United States Code, is amended by striking "This paragraph shall" and all that follows through the end of the paragraph.

Oral argument was then postponed to permit additional briefing on the implications of the new legislative action.[2]

The parties disagree as to the significance of the amendments. American Life asserts that the gold clause in the lease cannot be enforced because the 1996 amendment was written to be retroactive and the parties did not "specifically agree" to include the gold clause in the 1990 assignment. It therefore is only obligated to pay the lease amount of $18,000 per year on the building. It says the 1997 amendment has no effect here because it is not retroactive, citing *Landgraf v. U.S.I. Film Products*, 114 S. Ct. 1483 (1994). The lessors argue that the gold clause in this lease continues to have effect under either statute. They contend that the 1997 amendment is retroactive,

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[2] The parties have sought permission to file post-argument briefs addressing retroactivity issues, and their motions are granted.

making the 1996 amendment now irrelevant. They also say that even if the 1996 amendment applies to this lease, the gold clause is enforceable because American Life explicitly agreed in the assignment to be bound by "all of the terms and conditions" of the 1917 lease, and one of the terms of that lease was the gold clause.

American Life argues that the resolution of this case is a simple matter of applying the *Landgraf* holding which requires a clear expression of Congressional intent before a statute will be given retroactive effect. It is unable to cite a case, however, where the presumption was employed in a situation similar to the one here.[3] The 1996 amendment says that it "shall apply to any obligation issued on or before October 27, 1977 . . . ," thus indicating on its face a retroactive intent. *See Landgraf*, 114 S. Ct. 1483. The 1997 enactment simply states that the prior amendment is stricken. It does not use the type of language normally associated with retroactive effect. *See id.* Its apparent intent, however, is to eliminate the effect of the previous year's enactment, and to apply it in that way here would not implicate the policy interests underlying the presumption against retroactivity. This policy "has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact." *Id.* at 1500. As to the parties in this case, the interests of "fair

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[3] The statutory background in *Landgraf* was strikingly different from the one here. The statutory provisions at issue there were part of fundamental changes in civil rights law and resulted from a lengthy deliberative process. *See id.* at 1491, 1493. After Congress considered and rejected a version of the Civil Rights Act which had express retroactive language, it ultimately enacted a statute with none. *See id.* at 1491-92.

notice, reasonable reliance and settled expectations," *id.* at 1499, would weigh in favor of interpreting the 1997 amendment to return the law to its former state as it existed in 1990 at the time of the assignment to American Life.

The sequence of the legislative amendments and the involvement of these parties in that process are part of the full context of this case.[4] Each amendment reflected a desire to influence its outcome, and each was passed as a small item in an otherwise unrelated statute.[5] The 1997 amendment provided for the elimination of the entire 1996 amendment, and there is nothing to suggest that the language was carefully crafted to prevent its application here.

If a requirement of explicit statutory language commanding retroactivity is necessary for the 1997 amendment to have an effect on this case, however, then we must consider the effect of the 1996 amendment as controlling. The 1996 amendment required that a gold clause be specifically agreed to in order to be effective. The 1990 Warranty Assignment and Assumption agreement which controlled the assignment of the lease to American Life contains a reference to the original lease and provides that the assignor transfers the leasehold interest and that American Life, the assignee:

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[4] Initiatives by the parties in respect to the legislation were discussed at oral argument.

[5] The 1997 repeal was a small part of a voluminous act entitled "Treasury, Postal Service and General Government Appropriations, 1998."

> hereby accepts, assumes and agrees to be bound by all of the terms and conditions to be kept, observed, and performed by the lessee in said lease, as amended above described, from and after August 1, 1990. . . .

We previously held that this assignment amounted to a novation. This meant that the gold clause was enforceable under the 1977 statute since under Iowa law the 1990 novation amounted to a new obligation issued after the key statutory date. *See Klipp v. Iowa Grain Indemnity Fund Board*, 502 N.W.2d 9, 11 (Iowa 1993); *Eitzen's Estate v. Lauman*, 3 N.W.2d 546, 549-50 (1942). Under the 1996 amendment a gold clause is not enforceable "notwithstanding any assignment or novation" of a contract including such a clause unless the parties "specifically agree to include a gold clause in the new agreement." 31 U.S.C. § 5118(d)(2). The substituted contract must therefore demonstrate explicit intent to include a gold clause in the new obligation or it is not enforceable.

The substituted contract in this case satisfies the 1996 statutory requirement because it specifically included each clause of the original contract as a new term. American Life expressly assumed "*all* of the terms and conditions" (emphasis added) of the 1917 contract, and the gold clause in that contract was enforceable under the statute as it existed at the time of the 1990 assignment and as amended in 1996. Under Iowa law an assignment is a contract subject to the traditional rules of construction and where unambiguous, its words will be interpreted according to their common meaning. *Broyles v. Iowa Dep't of Soc. Services*, 305 N.W.2d 718, 721-22 (Iowa 1981) (citing 6A C.J.S. *Assignments* § 2 (1975); *Kinney v.*

Capitol-Strauss, Inc., 207 N.W.2d 574, 576-77 (Iowa 1973)). The terms of this assignment reveal the parties' intent to agree to include all original lease clauses, including the gold clause, in the new agreement created in 1990, thus satisfying the requirements of the 1996 amendment.

American Life claims that even if it specifically agreed to include the gold clause, the lessors did not. The statutory requirement is not satisfied unless "all parties" to the contract have agreed. American Life argues the lessors did not even realize that they could demand payment under the gold clause until 1991. The original lessor agreed in 1917 to all future assignments of the lease, however, and thus there was no need for them to agree to the gold clause contemporaneously with the 1990 novation. The statute only requires that all parties specifically agree to include a gold clause, not that all parties contemporaneously agree to include the clause. The original lessor specifically agreed to all clauses in the 1917 lease, including the gold clause, as well as to all future assignments, and lessors are the successors in interest. This is sufficient to satisfy the specific agreement requirement.

After reviewing the pertinent legislation subsequent to our earlier decision and the arguments raised by the parties, we conclude that the gold clause in this lease is enforceable and we reinstate our prior decision. Accordingly, we remand the case to the district court for further proceedings consistent with this opinion and *Trostel v. American Life & Cas. Ins. Co.*, 92 F.3d 736 (8th Cir. 1996).[6]

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[6] This resolution makes it unnecessary to consider the lessors' arguments that the 1996 amendment is beyond the

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CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

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power of Congress under the Commerce Clause or that the lease is commercially impracticable or voidable because of a failure of a fundamental condition.

AM. LIFE & CASUALTY INS. V. TROSTEL, ANNE, ET AL.

96-964

Tuesday, February 18, 1997

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for further consideration in light of the Economic Growth and Regulatory Paperwork Reduction Act of 1996.

No. 95-3666

Anne C. Trostel; Harry A. Holman, Jr.; H. L. Van Metre; Charles H. Van Metre; Dorothy Hurley; Terrance M. Hurly, Cmdr.; Carol Sabey, Mrs.; Plaintiffs/Appellants,	* * *

the current lessee, having acquired the leasehold interest in 1990. The lessors, successors in interest to the original lessor, brought this contract action against American Life after it refused to pay its monthly rent installments in gold coin as specified in the original lease. The district court granted summary judgment in favor of American Life on the basis that the gold clause had been erased from the 1917 lease by a 1933 act of Congress. We reverse and remand.

On June 27, 1917 John Trostel entered into a lease agreement with Morris and Jacob Joseph for commercial property in Des Moines, Iowa.[1] The second paragraph of the lease set the amount of annual rent at $12,000 for the first five years of the lease, $15,000 for the next 49 years, and $18,000 for the remaining 45 years. It also provided that "at the option of the lessor, all payments under this lease shall be made in gold coin of the United States of America, of or equal to the present standard of weight and fineness." In a separate paragraph, ninety days written notice was required as a condition precedent to the right of the lessor to demand payment in gold. Prior to the Depression era, gold clauses such as this were often included in long term rental agreements as a sort of price-indexing mechanism to protect a lessor from the effect of inflation. *See Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946, 947 (W.D. Wash. 1986), *aff'd sub nom. Fay Corp. v.*

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[1] The leased property was described as:

> Lot Four (4) and the West one-third (W. 1/3) of Lot Three (3) in Block "C" of Commissioner's addition to the City of Des Moines, now within the corporate limits of the City of Des Moines, Iowa.

Frederick & Nelson Seattle, Inc., 896 F.2d 1227 (9th Cir. 1990).

As part of the lease, the Josephs agreed to construct a building on the property that was at least eight stories in height. The lease gave the lessees the right to transfer or assign their interest in the lease, and provided that once the building was completed a proper assignment would relieve them of any further personal liability under the lease. A fourteen story building was completed on the property in 1931 and is now known as the Des Moines Building.

The lease was amended in writing four times, by supplemental agreements in 1921, 1927, and 1930 and by an amendment in 1959. It was also supplemented by a written Agency Agreement dated September 24, 1959.[2] Among other things, the amendments related to the building construction deadline, rent increases, and the appointment of an agent for the collection and receipt of rent.[3] Each of these amendments was recorded. None of

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[2] The amendment in 1959 related to the adoption of this Agency Agreement.

[3] In May 1921 the deadline was extended for the construction of the building on the property. In July 1927 a further extension was added, but it was agreed that the rent would increase each year that the building was not completed after the amended deadline. A 1930 amendment provided that the new lessee would construct a 14 story building on the property and the rent would increase upon its construction, and appointed an agent for the collection and receipt of rent. In 1959 the rights of the parties regarding rent payment, insurance, and notice were simplified and clarified.

these modifications referred to the gold clause in the original lease.

In 1933 Congress passed legislation which affected all gold clauses. A joint resolution of Congress declared gold clauses to be against public policy and provided that "dollar for dollar" payments in United States currency would discharge any obligation. Joint Resolution of June 5, 1933, 48 Stat. 112, 113 (1933) (formerly codified at 31 U.S.C. § 463) (codified as amended at 31 U.S.C. § 5118(d)(2)). This was one of a series of measures taken to stabilize the value of United States currency. *See Norman v. Baltimore & O.R. Co.*, 294 U.S. 240, 295-97 (1935). During the same period, private ownership of gold was banned and the dollar was devalued. *See Rudolph v. Steinhardt*, 721 F.2d 1324, 1325-26 (11th Cir. 1983) (citing Kenneth W. Dam, *From the Gold Clause Cases to the Gold Commission: A Half Century of American Monetary Law*, 50 Chicago L. Rev. 504 (1983)).

Subsequently in 1975 Congress repealed the ban on private ownership of gold, and in 1977 it passed an amendment to the 1933 gold clause statute. The amendment provided that the provisions of the 1933 statute would not apply to obligations issued after October 27, 1977. Act of October 28, 1977, Pub. L. No. 95-147, § 4(c), 91 Stat. 1227, 1229 (codified as amended at 31 U.S.C. § 5118(d)(2)).[4] In other words, as of October 28, 1977, it was once again legal to contract for payment in gold.

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[4] The 1977 amendment was originally codified at 31 U.S.C. § 463 (note), but in 1982 it was recodified at § 5118(d)(2) with only nonsubstantive changes. The statute currently provides:

> An obligation issued containing a gold clause or governed by a gold clause is discharged on payment

The interest in the Des Moines Building lease has been transferred numerous times, and three of the transfers are considered relevant by the parties. On May 7, 1969, State Automobile and Casualty Underwriters (State Auto) acquired the leasehold estate pursuant to a Warranty Assignment and Assumption. In this document, State Auto agreed to be bound by all of the terms and conditions of the 1917 lease, as amended by specific written and recorded amendments. The parties agree that this transfer of interest was a novation that created a valid contract between lessors and State Auto and that released the prior lessee from any obligation.

On December 20, 1985, State Auto transferred the leasehold interest to The Statesman Group, Inc. (Statesman), which later transferred it to American Life on August 15, 1990.[5] The 1985 and 1990 transfers were each accomplished pursuant to a recorded Warranty Assignment and Assumption (warranty agreement) similar to that used in the 1969 transaction.

(dollar-for-dollar) in United States coin or currency that is legal tender at the time of payment. This paragraph does not apply to an obligation issued after October 27, 1977.

[5] State Auto, The Statesman Group, and American Life are related corporate entities. At the time of the 1969 lease transfer, The Statesman Group controlled State Auto by owning 100% of the stock of its attorney-in-fact, Automobile Underwriters Corporation. At the time of the lease transfer to American Life in 1990, the Statesman Group directly owned and controlled 100% of American Life stock.

The 1990 warranty agreement, which is the basis of the current lease, specifically incorporated the terms of the 1917 lease. It provided that Statesman:

> does hereby sell, transfer, assign and setover unto [American Life] the leasehold estate more particularly described in that certain lease dated June 27, 1917, and recorded in the office of the Recorder of Polk County, Iowa, on April 25, 1923, in Book 870, Page 497, wherein Joseph (sic) and Jacob Joseph are the Lessees; as amended by Supplemental Agreement dated May 6, 1921, recorded in the office of said County Recorder on April 25, 1923, in Book 870, Page 501; as further amended by Supplemental Agreement dated July 20, 1927, in Book 1011, Page 239; as further amended by Supplemental Agreement dated May 31, 1930, in Book 1107, Page 291; and as further amended by Amendment to Lease dated September 1, 1959, recorded in the office of said County Recorder on October 2, 1959, in Book 3190, Page 331; and as further supplemented by Agency Agreement dated September 24, 1959, recorded in the office of said County Recorder on January 4, 1963, in Book 3476, Page 476. . . .

Statesman also warranted that the lease "has not been cancelled, surrendered or modified except pursuant to those supplements above specified and that said Lease is in full force and effect." The document also provided that American Life as grantee:

> hereby accepts, assumes and agrees to be bound by all of the terms and conditions to be kept, observed and performed by the lessee in said lease, as amended above described, from and after August 1, 1990. . . .

In a letter dated December 27, 1993, an attorney for the lessors demanded payment of the rental obligation from American Life in gold coin pursuant to paragraph two of the 1917 lease.[6] On March 25, 1994 American Life delivered a cashier's check in the amount of $515,583.33 to the agent, along with a letter explaining that it represented the total rental obligation for the remaining lease term through the year 2016.[7] The letter claimed that the payment to the agent constituted a complete discharge of all rent owing. Although the 1917 lease required that rent be paid monthly in advance, American Life claims that requirement is superseded by language in the 1959 amendment related to the appointment of an agent for rent collection.

The lessors' attorney instructed the agent to hold the check for a week, after which he advised that the tender had been refused and instructed the agent to return the check to American Life. American Life has refused to accept the check back, and no rent has exchanged hands since that time.

The lessors filed this case against American Life on July 29, 1994, claiming that it had breached the lease

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[6] The attorney at that time represented parties holding 2/3 of the lessors' interests. He repeated the demand on March 29, 1994 on behalf of the lessors holding the remaining 1/3 interest.

[7] American Life was apparently attempting to avoid the operation of the gold clause by paying off the lease within ninety days of receiving notice. The 1917 lease required that the lessor give ninety days notice of its demand for payment in gold. Because notice was given December 27, 1993, the required payment in gold would start in April 1994.

contract by failing to make payments in monthly installments and in gold coin. They believe that the 1990 transfer of the leasehold interest to American Life was a new obligation entered into after the 1977 amendment which once again permitted requirements of payment in gold. In their view the gold clause in the 1917 lease was revived by the terms of the 1990 warranty agreement. American Life argued that the gold clause was not part of the current lease and that its prepayment of rent for the remainder of the lease term satisfied its rental obligation.

The district court granted summary judgment for American Life and dismissed the action. It held that even if a new obligation had been created in 1990, the gold clause could not have been incorporated in it by reference to the terms of the 1917 lease because the 1933 act had rendered that clause void and erased it from the 1917 lease. The lessors appealed, arguing that the gold clause had not been erased from the 1917 lease, that it was revived by what they refer to as a novation in 1990, and that American Life breached the lease by refusing to pay in gold coin and by failing to make rental payments in monthly installments. American Life responds that the gold clause was erased from the original lease by the act of Congress. It also claims that the gold clause was severed from the lease by a novation in 1969, that the current lease between lessors and American Life does not contain a gold clause because the 1990 transfer was not a novation, and that its prepayment of rent for the remainder of the 99 year term satisfied its rental obligation. It alternatively argues that if the gold clause is enforceable, the amount due should be based on the value of gold in 1990 rather than in 1917.

The issue we must determine is whether the current obligations between the parties include the gold clause contained in paragraph two of the 1917 lease. American Life's obligations under the lease were created by the 1990 warranty agreement between it and Statesman. On its face the warranty agreement incorporates all of the terms of the 1917 lease. That lease included the gold clause, of course, which was not specifically mentioned in 1990 as being relevant or not.

If the 1990 transfer of interest created a new obligation between lessors and American Life, it could legally contain a gold clause because it took place after the time that gold clauses were prohibited. *See* 31 U.S.C. § 5118(d)(2); *Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946, 952 (W.D. Wash. 1986), *aff'd sub nom. Fay Corp. v. Frederick & Nelson Seattle, Inc.*, 896 F.2d 1227 (9th Cir. 1990) (gold clause in 99-year lease entered into in 1929 revived by post-1977 novation of contract); *Wells Fargo Bank v. Bank of America*, 38 Cal. Rptr. 2d 521, 529 (Cal. Ct. App. 1995) (same). The 1990 transfer of interest would create such a new obligation if it constituted a novation of the lease. *See Fay Corp.*, 646 F. Supp. at 952; *Wells Fargo Bank*, 38 Cal. Rptr. 2d at 529.

American Life states in its briefs that the 1990 transaction was not a novation, but it does not dispute that a valid new obligation was formed. Instead it argues that the new obligation did not contain a gold clause. Iowa law describes a novation as "a substituted contract that includes as a party one who was neither the obligor nor the obligee of the original duty." *Klipp v. Iowa Grain Indem. Fund Bd.*, 502 N.W.2d 9, 11 (Iowa 1993) (quoting, Restatement (Second) of Contracts § 280 (1981)). To prove

a novation under Iowa law, a proponent must show four elements: 1) a previous valid obligation; 2) agreement of all parties to a new contract; 3) extinguishment of the existing contract; and 4) validity of the new agreement. *Id.*

In this case there is no question that a valid previous lease obligation existed between Statesman and the lessors, that all parties agreed to a new contract,[8] that the obligations of Statesman were extinguished, and that a valid lease was created between lessors and American Life. American Life asserts that there was no novation as to the gold clause itself because the parties did not intend to incorporate it into the new lease. That argument involves how to interpret the terms of the existing contract, not whether a novation took place.[9] American Life does not suggest that the 1990 transaction was anything other than a novation.

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[8] The lessors' agreement to the novation arises from a clause in the 1917 lease which provided that the lessee could transfer the leasehold and that upon such transfer the lessee would be released from any personal liability. There is no claim here that the prior consent was invalid.

[9] Specifically, American Life claims there was no novation of the gold clause because the previous obligation between Statesman Group and lessors did to contain a gold clause. Even if the previous lease did not incorporate the gold clause, the terms of the new lease created by the novation are not limited to those in the previous lease. *See* Restatement (Second) of Contracts § 280 cmt. a (1981). American Life also claims that there was no meeting of the minds about whether to include a gold clause, but the explicit terms of the contract unambiguously suggest otherwise.

We conclude that under Iowa law the 1990 transfer of interest was a novation and that the parties were legally free to incorporate a gold clause into the lease agreement at that time. *See* 31 U.S.C. § 5118(d)(2); *Fay Corp.*, 646 F. Supp. at 952; *Wells Fargo Bank*, 38 Cal. Rptr. 2d at 529. That does not end the inquiry, however, because the parties did not explicitly mention gold or specifically identify each lease term. Rather, the 1990 warranty agreement simply incorporated all the terms and conditions in the 1917 agreement, and that lease had gold clause. American Life argues that the gold clause had been severed from the original lease by the 1933 act of Congress and that it was therefore no longer part of the 1917 lease terms.

The 1933 act providing that an existing (or future) obligation requiring payment in gold coin was dischargeable by payment in dollars. The parties disagree as to the effect of this statute on the gold clause in the 1917 lease. American Life says the statute amended the lease as a matter of law by removing the gold clause, but the lessors respond that the statute only made the clause unenforceable.

There is no question that between 1933 and 1977 the lessors could not successfully have demanded payment in gold coin from any lessee, but they claim that the 1917 clause was readopted by the 1990 warranty agreement and became effective pursuant to the 1977 statutory amendment. American Life admits that the 1933 act would not have prohibited the parties from contracting for a gold clause in 1990, but argues that the terms of the 1917 lease were permanently altered by the operation of the 1933 act, which had "erased" the gold clause from the 1917 lease.

Nothing in the terms of the 1933 act suggests that an existing gold clause would be "erased" or eliminated from the lease. Congress declared "any obligation which purports to give the obligee a right to require payment in gold" to be "against public policy" and stated that "no such provision shall be contained in or made with respect to any obligation hereafter incurred." Joint Resolution of June 5, 1933, Ch. 48, 48 Stat. 112, 113 (1933) (originally codified at 31 U.S.C. § 463) (currently codified as amended at 31 U.S.C. § 5118(d)(2)).[10] The 1933 act did not direct the existing gold clauses were to be severed from existing contracts, but instead rendered them unenforceable: it stated that every obligation, whenever it was incurred and whether or not it had a gold clause, was

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[10] The relevant portions of the Act state:

> Resolved by the Senate and House of Representatives of the United States of America and Congress assembled, That (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or particular kind of gold or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy and no such provision shall be contained in or made with respect to any obligation hereafter incurred. . . . Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar-for-dollar, in any coin or currency which at the time of payment is legal tender for public and private debts. . . .

Joint Resolution of June 5, 1993, Ch. 48, 48 Stat. 112, 113 (1933) (originally codified at 31 U.S.C. § 463) (currently codified as amended at 31 U.S.C. § 5118(d)(2)).

dischargeable upon payment in United States currency. *See Norman v. Baltimore & O.R. Co.*, 294 U.S. 240 (1935) (upholding 1933 act as valid exercise of Congressional power to establish a monetary system and determining that enforcement of gold clauses was incompatible with public interest).

The idea that the gold clause disappeared from the original lease is not supported by the specific text of the statute, which contemplates that contract might continue to contain gold clauses by referring to "every obligation heretofore or hereafter incurred." Moreover, the text of the 1977 amendment refers to obligations "containing" gold clauses.

American Life relies on cases stating broad principles such as "contract provisions that are contrary to public policy are void" to suggest that the 1933 statute operated to erase existing gold clauses. *See, e.g., McBrearty v. United States Taxpayers Union*, 668 F.2d 450, 451 (8th Cir. 1982) (agreements contravening public policy are void); *In re NWFX, Inc.*, 881 F.2d 530, 538 (8th Cir. 1989). The cases cited do not support its claim that existing gold clauses were rendered unrevivable by the 1933 act. None of the cases involve the incorporation of a once prohibited clause into a new contract by reference to an original document containing it.

The 1933 act did not magically erase the gold clause from the 1917 lease. Although it rendered the clause unenforceable, there is no reason that it could not be incorporated by reference in a new lease obligation entered into in 1990. *See Fay Corp.*, 646 F. Supp. at 952; *Wells Fargo Bank v. Bank of America*, 38 Cal. Rptr. 2d at 529.

American Life suggests that even if the clause were not voided in 1933, the 1969 transfer of the leasehold interest to State Auto severed the clause from the original lease. It claims that transaction was a novation that took place during the time that gold clauses were banned, but does not explain why that would delete the clause from the original lease or prevent later adoption of the original clause. The gold clause would of course not have been enforceable against State Auto because its obligation was entered into prior to the 1977 amendment. When it transferred the leasehold to Statesman in 1985, however, it did not purport to transfer its own obligations, but instead described the leasehold by the terms of the original lease. Similarly, the transfer of interest from Statesman to American Life in 1990 referred to the terms and conditions of the 1917 lease.

The 1917 lease contained an explicit gold clause, and neither the 1933 act nor the 1969 novation prevented its incorporation by reference into the terms of the new lease in 1990. The gold clause was valid at the time the original lease was executed, and although it was rendered unenforceable after 1933, it remained a written term of the lease as recorded and amended. The leasehold interest was transferred to American Life after the prohibition on gold clauses had been set aside by Congress, and the transfer specifically referred to the obligations described in the 1917 lease and its written amendments. Nothing in the 1990 warranty agreement indicated that American Life accepted only those obligations that had been legally enforceable against all previous lessees. Instead it specifically agreed to be bound by the obligations described in the 1917 lease and its written amendments.

American Life also suggests that the existing obligation between it and the lessors does not contain a gold clause because the parties did not intend to include a gold clause as a contract term in 1990. It claims that there is extrinsic evidence that the parties did not reach a meeting of the minds about incorporating a gold clause into the contract in 1990. That evidence includes affidavits to the effect that American Life did not intend to assume an obligation to pay rent in gold, as well as the fact that the lessors became aware that gold clauses could legally be incorporated into new agreements in 1991.

When construing a written contract under Iowa law, the intent of the parties controls, and unless there is ambiguity, intent is determined by what the contract itself says. *See Howard v. Schildberg Constr. Co.*, 528 N.W.2d 550, 554 (Iowa 1995); *Anderson v. Aspelmeier, Fisch, Power, Warner & Engberg*, 461 N.W.2d 598, 600 (Iowa 1990). The language of the 1990 warranty agreement is not ambiguous. American Life agreed to be bound by the terms of the 1917 lease as recorded and as amended by the specified recorded amendments. The intent of American Life to be bound by these terms, which included an explicit gold clause, is expressed in clear and unambiguous language, and the contract thus should be enforced as written. *See Howard*, 529 N.W.2d at 554.

American Life also claims that its advance payment of rent on the remaining years of the lease satisfied its obligations. The 1917 lease required that the rent be paid to the lessor monthly in advance. American Life concedes that such a provision generally precludes a lessee's right to prepay rent, but claims that the 1959 amendment to the lease superseded it and allowed prepayment.

The 1959 amendment was made to "simplifiy and clarify the arrangements as to payment of rent, the handling of insurance policies, the deposit of evidences of payment of taxes and other items, the designation of Agents, the giving of Notices, and the treatment of Lessee's option to purchase the fee title to the real estate." It made specific changes to several paragraphs of the original lease including paragraph 31, which had been added by amendment in 1930. Paragraph 31 provided that an agent would be appointed, that its duties were to be "essentially ministerial," and would "include the collection and receipt of rents under said lease." The amendment provided that delivery to the agent "of checks, money, notices, documents, written information, and the like," would "constitute delivery thereof to Lessee or Lessors." It further stated:

> The payment of rent by the Lessee to such an Agent shall constitute a complete discharge of the rent so paid, and the Lessee shall not be required to take notice of the termination of any such Agent's authority of the appointment of a successor unless notified in writing thereof in the manner in this lease provided for the service of notices.

American Life argues that the 1959 amendment removed the requirement that rent must be paid monthly or at least creates an ambiguity whether it must. By its terms, however, the 1959 amendment relates only to whom the rent should be paid, and does not imply that the amount or timing of the payment would be affected. The contract as amended is unambiguous that the rent must be paid to the agent monthly in advance. American

Life could not fulfill its obligations under the contract by prepaying the rent for the remainder of the term.

The parties also disagree on the proper value of any gold payment required. American Life claims the requirement of payment in gold "of present weight and fineness" would refer to the value in 1990, rather than in 1917. The lessors believe that the value of gold in 1917 was intended. The district court did not consider this issue because it held that the gold clause could not have been revived as a matter of law. Since the term relating to "present weight and fineness" is ambiguous, resolution of the issue will involve a factual inquiry. It should therefore be addressed in the first instance by the district court.

For the stated reasons, the judgment is reversed and the cases is remanded for further proceedings consistent with this opinion.

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Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ANNE C. TROSTEL, et al.,	*	CIVIL NO. 4-94-70494
Plaintiffs,	*	RULINGS ON CROSS-MOTIONS FOR SUMMARY JUDGMENT, AND ORDER OF DISMISSAL
v.	*	
AMERICAN LIFE & CASUALTY INSURANCE COMPANY,	*	
Defendant.	*	(Filed Sep. 29, 1995)

Plaintiffs, owners of interests in a parcel of land in downtown Des Moines, Iowa, are successors in interest to John Trostel, lessor under a lease agreement executed in 1917. Plaintiffs bring suit against defendant, the current lessee, seeking specific performance of a clause in the lease allowing the lessors to require payment of the monthly rent in gold coin. Defendant moves for summary judgment. Plaintiffs resist and move for partial summary judgment. Arguments were heard and the motions are submitted.

Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment

> shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits,

> if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). Rule 56(e) requires the nonmoving party to go beyond the pleadings and by affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Johnson v. Schopf*, 669 F. Supp. 291, 295 (D. Minn. 1987).

Summary judgment is appropriate only where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 322-23; *Kopp v. Samaritan Health Center, Inc.*, 13 F.3d 264, 268 (8th Cir. 1993). On a motion for summary judgment, the court views all the facts in the light most favorable to the nonmoving party, and gives that party the benefit of all reasonable inferences that can be drawn from the facts. *Kopp*, 13 F.3d at 269; *United States v. City of Columbia, Mo.*, 914 F.2d 151, 153 (8th Cir. 1990).

Facts

The parties are in agreement as to most of the basic facts. In 1917, a ninety-nine year lease was entered into between John Trostel, lessor, and Morris and Jacob Joseph, lessees. The agreement is currently comprised of the original Lease dated June 27, 1917, and four amendments: a Supplemental Agreement dated May 6, 1921; a Supplemental Agreement dated July 20, 1927; an Amendment to Lease dated May 31, 1930; and an Amendment to Lease

dated September 1, 1959. There is also an agency agreement, pursuant to certain terms in the 1959 amendment, which was entered into on September 24, 1959.

Terms of the Lease

Many of the leased terms are relevant to the cross motions, including the following:

> Second. The Lessees covenant and agree to pay to the Lessor, as rent for said demised premises, during the first five years of said term, the annual rental of Twelve Thousand Dollars ($12,000.00), to be paid to the lessor in equal monthly installments of One Thousand Dollars monthly installments of One Thousand Dollars ($1,000.00), each in advance, on the first day of each month during said period of five years.

The rent was scheduled to increase after five years and again after the fiftieth year. The rent term was amended by the 1930 Amendment and the rent prior to the dispute leading to this case was $23,000 per year. Paragraph "Second" of the 1917 Lease also includes the so-called "gold clause" at the heart of this dispute:

> At the option of the lessor, all payments under this lease shall be made in gold coin of the United States of America, of or equal to the present standard of weight and fineness.

The "gold clause" was modified by paragraphs "Third" and "Twenty-fifth":

> Third. It is expressly understood and agreed by and between the parties that no acceptance by the Lessor of any currency, legal tender, checks, coin, money, or value whatever, except

> standard gold coin of the United States of America, as hereinbefore specified, in payment of any installment of rent, shall be construed to be a waiver on the part of the Lessor to demand the payment of any other unpaid installment of rent in standard gold coin * * * .
>
> Twenty-fifth. As a condition precedent to the right of lessor to demand payment in gold coin of amounts becoming due to him under this lease, he shall give ninety days' written notice thereof to lessees.

The original Lease also required that lessees construct a building on the property that was to meet certain specifications and be completed by a date set in the Lease. The specifications and required completion date were amended by the 1921 Supplemental Agreement and the 1927 Supplemental Agreement. The 1927 Supplemental Agreement also amended the right of assignment, making reference to the required building:

> Twenty-second. Lessees shall have the right to transfer or assign this lease, but said transfer or assignment shall be without force and effect until the assignment thereof has been filed of record in the office of the County Recorder in and for Polk County, Iowa, and until notice of such assignment has been given to said Lessor or his authorized agent. The Lessees, however, shall remain liable under this lease, notwithstanding such assignment, until the completion of said eight-story building * * * whereupon their personal liability shall cease.

Finally, the 1959 Amendment makes clear that payment or rent or service of any notices with the joint agent constitutes delivery to the lessor and the lessee. Payment

of rent to the agent constitutes complete discharge of the rent.

Chronology of Events

In 1917, the original Lease was signed. Amendments were made in 1922, 1927, and 1930.

In 1931, a fourteen-story building was completed on the subject property, fulfilling those conditions in the Lease relating to or linked to such improvements.

In 1933, Congress passed a Joint Resolution, invalidating gold clauses, which provided, in pertinent part:

> (a) every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount of money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts.

Act of June 5, 1933, 48 Stat. 112-113 (originally codified at 31 U.S.C. § 463; codified as amended at 31 U.S.C. § 5118) (hereinafter the "1933 Act").

In 1959, the Lease was again amended, and the parties entered into the agency agreement.

In 1969, National Realty Investors, then the lessee, executed a "Warranty Assignment and Assumption" in which it agreed to

> sell, transfer, assign and set over unto Automobile Underwriters Corporation, an Iowa Corporation, Attorney-in-Fact for State Automobile and Casualty Underwriters * * * the leasehold estate more particularly described in that certain Lease dated June 27, 1917 * * * .

It is undisputed that this transfer was in the form of a novation and, therefore, a new contract.

In 1977 and 1982, Congress passed P.L. 95-147 and P.L. 97-258, amending 31 U.S.C. § 5118(d)(2) to read:

> An obligation issued containing a gold clause or governed by a gold clause is discharged on payment (dollar for dollar) in the United States coin or currency that is legal tender at the time of payment. *This paragraph does not apply to an obligation issued after October 27, 1977.*

(emphasis added).

In 1985, State Automobile and Casualty Underwriters ("State Auto") executed a "Warranty Assignment and Assumption" transferring "the leasehold estate more particularly described in that certain Lease dated June 27, 1917" and amendments to The Statesman Group, Inc. ("Statesman").

In 1990, Statesman, using the same language, transferred its interest to defendant, American Life and Casualty Insurance Company ("American Life").[1]

On December 27, 1993, plaintiffs first gave notice to defendant of their intent to exercise the option to be paid in gold. On March 25, 1994, defendant delivered to the joint agent a check for $515,583.33, representing the outstanding balance of the lease at the current rent through the expiration date, August 31, 2016. In a letter dated March 29, 1994, plaintiffs informed the joint agent and defendant that they would not accept the offer of prepayment and returned the check to the agent. Defendant refused to accept the returned check and has made no further rent payments.

Discussion

Plaintiffs attempt to enforce, for the first time, the "gold clause" contained in the 1917 Lease. To do so, all of the following must be established. First, the 1933 Act that invalidated gold clauses must have rendered such clauses unenforceable rather than totally voiding the clauses. Second, because the 1969 novation took place when gold

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[1] In 1969, Statesman owned 100% of the stock of Automobile Underwriters Corporation (AUC), the Attorney-in-Fact for State Auto. The relationship between Statesman, State Auto, and AUC remained unchanged through the date of the 1985 assignment. As of the date of the 1990 assignment, Statesman owned 100% of the stock of defendant American Life. The reasons for the 1985 and 1990 assignments were not undertaken with an intent to change the terms of the lease, but rather for reasons internal to the organization of Statesman.

clauses were still prohibited, the gold clause must have survived the 1969 novation, allowing that provision to be transferred after 31 U.S.C. § 5118 was amended to permit such provisions. Third, one or both of the 1985 and 1990 transfers would have to be a novation. Finally, the post-1977 novation must have created a valid new contract that included the gold clause among its terms.

The 1933 Act Renders Gold Clauses Void

Interpretation of the 1933 Act and its effect on the post-Act viability of gold clauses has not been addressed by the Eighth Circuit. Upon a careful review of the language of the 1933 Act I believe that the 1933 Act, by its terms, does more than merely render gold clauses unenforceable. Gold clauses already in existence were "declared to be against public policy," and with respect to future contracts, the Act made clear that "no such provision shall be *contained in or made* with respect to any obligation hereafter incurred."

The public policy was evidently a strong one: gold clauses were prohibited for more than forty years, and in 1934, Congress went even further, banning the private ownership of gold. *Fay v. BAT Holdings I*, 646 F. Supp. 946, 948 (W.D. Wash. 1986). As a general rule, an agreement or term of an agreement that contravenes public policy is void. *McBrearty v. U.S. Taxpayers Union*, 668 F.2d 450, 451 (8th Cir. 1982); *see also In re NWFX, Inc.*, 881 F.2d 530, 538 (8th Cir. 1989) ("[I]n most other jurisdictions, contracts which are contrary to public policy are void."); *cf. Jordan v. Iowa Dept. of Transp.*, 468 N.W.2d 827, 830 (Iowa 1991) (recognizing "void as against public policy" defense, but

finding facts of case did not establish a violation of any clear public policy).

Interpreting the 1933 Act as voiding gold clauses rather than rendering them unenforceable is also the most logical reading of the Act's prohibition against such clauses being "contained in" contracts. *See* Black's Law Dictionary 1573 (6th ed. 1990) (defining void as "null; ineffectual; nugatory; having no legal force or binding effect * * * .")

I conclude that the 1933 Act voided all extant gold clauses, including the clause in the 1917 Lease. Moreover, as the 1933 Act prohibited gold clauses from being "contained in" future agreements, the clause would have been severed from the Lease by the 1969 novation that occurred while the prohibition against gold clauses was in effect.

Gold Clause Not Reinstated After 1977 Amendment

The only way plaintiffs can enforce the gold clause against the current lessee is if the clause was somehow reinstated. It is clear from the language of the 1977 and 1982 amendments to the 1933 Act that the renewed allowance of gold clauses was not retroactive. *See* 31 U.S.C. § 5118(d) (the language, "[t]his paragraph does not apply to an obligation issued after October 27, 1977," was inserted rather than the prohibition being stricken). For plaintiffs to prevail there must have been some event after October 27, 1977 that renewed the gold clause.

Because the 1933 Act voided the gold clause, there are no circumstances that could restore its validity other

than the clause being part of a new, bargained-for exchange. *See* Black's Law Dictionary 1573 (6th ed. 1990) ("void in the strict sense means that an instrument or transaction is nugatory and ineffectual so that *nothing can cure it*") (emphasis added); *see also School Dist. No. 1 of Silver Bow County v. Driscoll*, 568 P.2d 149, 154 (Mont. 1977) (" 'A 'void thing' is no thing; it has no legal effect whatsoever and no right whatever can be obtained under it or grow out of it. In law it is the same thing as if the 'void thing' had never existed.' Thus * * * even a subsequent act of the legislature could not cure something that was void.") (quoting *Lowery v. Garfield County*, 208 P.2d 478 (Mont. 1949) (internal citations omitted). While it is undisputed that the 1985 and 1990 assignments referenced the 1917 Lease, that Lease could not have included among its terms an assignable gold clause. When the clause was *voided* in 1933, it was, in effect, erased from the 1917 Lease.

Wells Fargo, Fay Cases Distinguished

Plaintiffs rely on two cases, *Wells Fargo Bank v. Bank of Am.*, 38 Cal. Rptr. 2d 521 (Cal. App. 1995) and *Fay Corp. v. BAT Holdings I, Inc.*, 646 F. Supp. 946 (W.D. Wash. 1986), *aff'd*, 896 F.2d 1227 (9th Cir. 1990), that give support to their position.

These cases are not controlling on this court. I have, of course, carefully considered the reasoning each presents. I respectfully disagree with the basic premise in each case that the gold clause was merely unenforceable and dormant, not void, after the 1933 Act.

Because I find that the gold clause in the 1917 Lease was rendered void by the 1933 Act, I conclude that the post-1977 transfers of the leasehold interest, even if they were valid novations, could not have revived the gold clause by mere reference to the 1917 Lease. Reactivation of the gold clause in a post-1977 Lease would require an overt agreement between the lessor and lessee to do so. Accordingly, defendant's motion for summary judgment will be granted and plaintiffs' motion for partial summary judgment will be denied.

Rulings and Order

Defendant's motion for summary judgment is GRANTED.

Plaintiffs' motion for partial summary judgment is DENIED.

IT IS ORDERED that plaintiffs' complaint is DISMISSED.

Dated this 29 day of September, 1995.

/s/ Harold D. Vietor
HAROLD D. VIETOR,
District Judge
Southern District of Iowa

RELEVANT PROVISIONS OF THE 1917 LEASE

At the option of the lessor, all payments under this lease shall be made in gold coin of the United States of America, of or equal to the present standard of weight and fineness.

* * *

Twenty-second. Lessees shall have the right to transfer or assign this lease, but said transfer or assignment shall be without force and effect until the assignment thereof has been filed of record in the office of the County Recorder in and for Polk County, Iowa, and until notice of such assignments has been given to said Lessor or his authorized agent. The Lessees, however, shall remain liable under this lease, notwithstanding such assignment, until the completion of said eight story building, thereupon their personal liability shall cease.

Twenty-third. In case the Lessor, his executor, administrator, successor or assigns shall desire to sell said premises, then the Lessees shall have the first option to purchase the same on the same terms and conditions as given to any other party. Said lessees shall have ten days within which to exercise said option after notice in writing to said Lessees by said Lessor of his intention to sell.

Twenty-fourth. All provisions, conditions and covenants of this lease, whether it be so expressed or not, shall bind and inure to the benefit of (as the case may be) the heirs, successors and executors, administrators and assigns of the respective parties hereto.

Twenty-fifth. As a condition precedent to the right of lessor to demand payment in gold coin of amounts

becoming due to him under this lease, he shall give ninety days' written notice thereof to lessees.